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No. 90-1833 (2)

In The

Supreme Court of the United States

October Term, 1990

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs.

STEVEN BLOUNT,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the State of New York

BRIEF IN OPPOSITION FOR RESPONDENT

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REASONS FOR DENYING THE WRIT

In seeking a grant of certiorari, the petitioner argues that this Court's decision in *Perry v. Leeke,* 488 U.S. 272 (1989) so fundamentally altered its previous holding in *Geders v. United States,* 425 U.S. 80 (1986) as to authorize a state trial court to direct a defense attorney not to speak with his testifying client

concerning his ". . .testimony at all" (Petitioner's Appendix C, 9a) during a seventeen and one-half hour overnight recess.[1] This interpretation of *Perry* is incorrect. Moreover, as there is little or no disagreement within the state and federal judiciaries concerning the reach of *Perry*, and the issue is otherwise of limited import, the petitioner's writ should be denied.

Initially, it should be noted that *Perry* itself expressly recognized that in the context of lengthy trial adjournments — such as the overnight recess here — any communication between an attorney and his testifying client must *inevitably* include matters related to testimony. *Perry*, 488 U.S. at 284. In so recognizing, *Perry* made clear that in such a context, "It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling . . . [t]he fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right." *Id.* at 284. The Court has thereby determined that the appropriate manner of evaluating this issue is to look to the *length* of the adjournment, not the *content* of the attorney-client communication.

This method was deemed sound by the *Perry* majority because it serves to promote the truth-seeking function of the criminal trial, as well as to protect the right of defense attorney and client to meaningfully communicate during lengthy strategy sessions. By avoiding a content-based analysis, the Court expressly recognized that a defense attorney must be able to freely communicate with his client concerning all facets of the case during lengthy strategy sessions, and implicitly determined that there is

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1. The State's Petition neglects to note that although the trial court adjourned the case at 4:40 p.m. the respondent did not resume cross-examination the following day until 10:10 a.m.(Trial Transcript, 288-289). Thus, the period of sequestration was in excess of seventeen and one-half hours.

simply no meaningful way of constructing a sufficiently specific testimonial sequestration without running afoul of the Sixth Amendment right to counsel. *See United States v. Cobb,* 905 F.2d. 784 (4th Cir.), *cert. denied sub nom Hatcher v. United States,* ____ U.S. ____, 111 S. Ct. 758, 112 L. Ed. 2d 778 (January 14, 1991). Whatever difficulties courts may eventually face in determining whether or not trial recesses are lengthy or brief, pales in comparison to the impossible task of itemizing those specific topics which an attorney may or may not discuss with his client during overnight or over-weekend recesses.

The instant case proves the point. Here, at the time of the overnight recess, the respondent's direct and cross-examination had spanned sixty-five pages of transcript, including testimony concerning his first meeting with the complainant in September 1986, his second encounter a week later, the incident itself of September 24th, and the evening of his arrest, two days later. The testimony included mention of perhaps a dozen potential defense witnesses who might corroborate the respondent's claim that the complainant had provoked the two earlier incidents, and that the respondent had acted in self-defense on the date of incident. Simply stated, the respondent's testimony encompassed almost everything of substance concerning the case.

In the above setting, the trial court's order, "not to discuss testimony at all" effectively prohibited any meaningful communication between attorney and client concerning anything of significance at the most critical point in the case, the trial itself. It is plain that such a sweeping order denied the respondent his right to the guiding hand of counsel when it was most needed.

Since the decision in *Perry*, there has been a dearth of reported appellate cases involving testimonial sequestrations. In *Cobb v. United States, supra*, the Fourth Circuit reviewed facts strikingly similar to the case at bar. There, a trial court directed Cobb not

to speak with his attorney concerning his ongoing testimony during a weekend recess. The defendant was in the middle of cross-examination at the time of the order. On appeal, the Government advanced the identical argument as petitioner here. The court rejected the claim, noting *inter alia*:

> [t]o remove from Cobb the ability to discuss with his attorney any aspect of his ongoing testimony effectively eviscerated his ability to discuss and plan trial strategy. To hold otherwise would defy reason. How can competent counsel not take into consideration the testimony of his client in deciding how to try the rest of his case?

Id. at 792.

In reaching this conclusion the Fourth Circuit relied, in part upon *Mudd v. United States,* 798 F.2d 1509 (D.C. Cir. 1986), a pre-*Perry* decision. The *Mudd* court determined that a more narrowly drawn testimonial sequestration[2] was nonetheless violative of the Sixth Amendment:

> . . .an order such as this one in this case can have a chilling effect on cautious attorneys, who might avoid giving advice on non-testimonial matters for fear of violating the court's directive. Consultation between lawyers and clients cannot be neatly divided into discussions about "testimony" and those about "other" matters.

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2. The trial court in *Mudd* directed defense counsel ". . . not to talk to Mr. Mudd about his testimony between now and the time he undergoes cross-examination. You can talk to him about other things, but not about his testimony." *Mudd v. United States, supra,* 798 F.2d 1509, 1510.

Id. at 1512. In concurrence, then Associate Circuit Judge Scalia wrote:

> I agree with the majority that the District Court's order prohibiting defendant from discussing his testimony with his attorney during a weekend recess was not significantly less invasive of sixth amendment rights than the order prohibiting all contact between a defendant and his attorney during an overnight recess in *Geders v. United States*, . . . I therefore join in the majority's holdings that a prohibition on attorney client discussions during substantial recesses, even if limited to discussion of testimony, violates the sixth amendment and that, like the similar violation at issue in *Geders*, it constitutes per se reversible error.

Id. at 1515.

Petitioner points to the Maryland Court of Appeals decision in *Wooten-Bey v. State,* 318 Md. 301, 568 A.2d 16 (1990), the only case cited by petitioner which even remotely adopts the suggested content-oriented approach. There, however, the period of sequestration was a luncheon recess that spanned only seventy-five minutes,[3] a period of time deemed sufficiently brief as to trigger the separate analysis in *Perry*.

Given the paucity of reported caselaw since *Perry*, there is no basis to conclude that an issue of constitutional magnitude has been inconsistently decided within the state and federal judicial systems, or that trial courts are having difficulty reconciling *Geders*

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3. As noted in the first footnote in the decision, the luncheon recess began at 12:15 p.m. and ended at 1:30 p.m., a period of seventy-five minutes, not two hours. *Wooten-Bey v. State, supra,* 318 Md. 301, at 302-303.

and *Perry*. To the contrary, the issue has rarely arisen, and when it has, all courts have recognized the time-oriented standard of the *Geders/Perry* principles. The rules are clear and subject to application. Further elaboration is unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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